JUN 11 2001 (9)

Supreme Court, U.S.
FILED
JUN 11 2001
OFFICE OF THE CLERK

No. 00-927

In The

Supreme Court of the United States

ELAINE L. CHAO, Secretary Of Labor,

Petitioner,

versus

MALLARD BAY DRILLING, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT MALLARD BAY DRILLING, INC.

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STATEMENT OF FACTS

Mallard owns and operates drilling rigs and barges for oil and gas exploration from its principal place of business in New Iberia, Louisiana. Mallard is owner and operator of the MR. BELDON, otherwise designated as Mallard Rig 52, an inland drilling barge, (Official No. 644167), measuring 190 feet in length and 50 feet in breadth and weighing approximately 1,482 tons with its home port in New Orleans, Louisiana. The MR. BELDON is a special purpose drilling barge and one of ten classified deep drilling barges owned by Mallard in the United States. It is a non-self propelled barge which is moved to location by tugboat.

The MR. BELDON was built in 1981 and construction plans were reviewed by the American Bureau of Shipping (ABS). Following initial construction, the rig was neither classed nor reinspected by the ABS. While Rig 52 received a Certificate of Documentation from the United States Coast Guard, it does not hold a Coast Guard Certificate of Inspection. Accordingly, while it is treated as an "uninspected" vessel by the United States Coast Guard, it still nonetheless comes under the jurisdiction of the Coast Guard.

While the MR. BELDON is classified as an uninspected drilling vessel, it nevertheless must comply with a plethora of Coast Guard regulations regarding navigation, safety, and working conditions of seamen. Douglas Halsey, a marine safety expert retained by Mallard and former Lt. Commander of the Coast Guard for over 20 years, performed a vessel inspection of the MR. BELDON. Halsey confirmed that the MR. BELDON's living quarters

met or exceeded Coast Guard requirements for structural fire protection, habitability, machinery spaces, electrical distribution system, fire prevention, life-saving, communication, abandon ship, training and safety programs. While the MR. BELDON was not manned by Coast Guard licensed personnel, all of its crew members were deemed to be "seamen" who were afforded protection under federal law as well as protection through the United States Coast Guard.

On June 16, 1997, the MR. BELDON was located at Little Bayou Pigeon, a navigable body of water in the territorial waters of the State of Louisiana, Parish of St. Martin. On that date, the MR. BELDON was performing oil and gas drilling operations pursuant to a drilling contract with Denbury Management, Inc., drill operator on State Lease 411.

The rig initially arrived on location on April 9, 1997; at no time prior to the incident in question did anyone from OSHA ever inquire or step foot on Rig 52 for inspection purposes or otherwise. The well was drilled without incident and reached a total depth of 13,430 feet on May 27, 1997. The Denbury 411 No. 19 well was in the final stages of completion when the blowout at issue occurred.

The Mallard crew was in the process of completing the well. Efforts were taken to displace drilling fluids with a calcium chloride solution. In order to accomplish this task, drilling mud was pumped out of the mud pits on the rig so that the tanks could be cleaned and used to mix the calcium chloride. In order to displace the drilling mud, the calcium chloride was to be pumped down the annulus and the returns would be taken up through the

drill pipe with a 25-foot stinger attached thereto. A TIW valve was attached at the top of the drill pipe. Since the stinger was eventually to be lowered into the packer assembly, thus causing the TIW valve to be lowered below the rotary, a joint of drill pipe was attached on top of the first TIW valve and the second TIW valve was placed on top of the joint of drill pipe. A piece of chicksan was then used to redirect the flow from the TIW valve down into a high pressure rubber hose which led to the rig's "possum belly." From the possum belly the mud was to be pumped into barges adjacent to the rig.

When the reverse circulation process was almost completed, rig personnel noted a sudden increase in flow and pressure. Pumps were turned off immediately and efforts were taken to close the lower TIW valve. Since this valve was approximately eight to ten feet above the drill floor, a ladder was initially used. When efforts to close the valve were unsuccessful, the drill string was lowered so that more men could attack the problem from the rig floor. The crew then discovered a leak in the area of the chicksan.

While all non-essential personnel were evacuated from the rig, the night crew remained and began making efforts to transfer mud back into the rig's mud tanks. During this process an explosion occurred which killed four seamen and injured two others.

On the morning of June 17, 1997, Captain John Gretz, Lt. Jason Neubauer and Lt. Commander Ken Carlite of the United States Coast Guard, Marine Safety Office in Morgan City, Louisiana, conducted a full investigation

into this casualty. In fact, the Coast Guard set up a command center in Butte LaRose and interviewed various Mallard employees located both on the MR. BELDON and at its main office in New Iberia, Louisiana. The United States Coast Guard spent approximately six months investigating this matter at which time it submitted an extensive blue ribbon post-casualty report.

No one questions the jurisdiction of the United States Coast Guard over this marine casualty. Chief Warrant Officer Gretz was specifically questioned regarding the Coast Guard's jurisdiction over the pertinent casualty and unequivocally testified that the Coast Guard is charged with, and did in fact discharge, its responsibility of investigating this "marine casualty,"; his testimony is illustrative:

Q: What was the purpose of your inspection?

A: The purpose was to investigate a marine casualty.

Q: What is a marine casualty?

A: A marine casualty covers a number of areas: fire, explosion, death, injury, among other criteria, yes, sir.

Q: Was there any special legislation or regulation of the United States Code that would give you the authority to conduct such an inspection?

A: Yes, this investigation was conducted under authority of 46 C.F.R. Part 4, as derived from authority in 46 U.S.C. § 6301.

Q: Are there certain conditions that designate whether or not a casualty is considered a marine casualty; a serious marine incident?

A: This one was designated as a serious marine incident. 46 C.F.R. 4.03-2 requires for a designation of a serious marine incident that one or more of the following occur: multiple injuries requiring medical attention, damage of property in excess of $100,000.00; and I believe there are other criteria in there also.

Q: Can you tell the court what was the scope of your investigation?

A: The scope of this investigation was to look at procedures, engineering and overall crew competency.

(TR p. 26).

Clearly then, the Coast Guard had jurisdiction over this casualty and in fact invoked that jurisdiction.

While Rig 52 was an uninspected vessel, it is plainly subject to Coast Guard authority. Simply put, an uninspected vessel is merely one that does not hold a United States Coast Guard issued Certificate of Inspection and is not inspected by a United States Coast Guard inspecting officer on a regularly scheduled basis. Nevertheless, the Coast Guard has issued regulations that specifically address uninspected vessels.

Chief Gretz testified at trial as follows:

Q: As a member of the United States Coast Guard, is the general goal the safety of life at sea?

A: Yes.

Q: Is that a fair statement?

A: Yes, sir.

Q: And "sea" that means any navigable waterway in which a vessel either flagged by the United States or within the United States territorial waters comes under the jurisdiction of the Coast Guard?

A: Yes.

Q: In this situation, Rig 52 was a vessel?

A: Yes, it was.

Q: It was a documented vessel?

A: Yes.

Q: It has an official number?

A: Yes.

Q: In order for it to conduct its operations, it was towed from one location to the ultimate location where this blowout occurred?

A: Yes.

Q: In connection with towing and moving it from one location to the other, it has to move on the navigable water of the United States?

A: Yes.

Q: And in connection with that, it has to have certain requirements such as navigational ways, lights?

A: Yes.

Q: Does it also have to have certain life-saving equipment such as life-saving rings?

A: Yes.

Q: Does it have to have firefighting equipment?

A: Yes.

Q: Does it have to have station bells?

A: Yes.

Q: Does it have to have other items that are promulgated by the United States Coast Guard that would apply to vessels?

A: Yes.

(TR pp. 42-44)

OSHA on the other hand and in particular its "investigator," Mike Spohrer, conducted no investigation into this casualty. To quote Mr. Spohrer he "stayed in the background" and did not personally interview any Mallard employees nor did he ever step foot aboard the MR. BELDON to conduct an actual inspection of the vessel itself. In short, Spohrer did nothing but "piggyback" the investigation performed by the United States Coast Guard. Just as important, Spohrer had neither the technical maritime training nor experience to perform a complete investigation of a serious marine casualty aboard a special purpose drilling vessel such as the MR. BELDON.

Spohrer gave his "interpretation" as to the jurisdiction of OSHA over this casualty:

Q: What is it?

A: *It's my directions on how to interpret the memorandum of understanding between the U.S. Coast Guard and OSHA.*

Q: And why was it necessary for you to review this document during the course of your inspection?

A: I wanted to be certain that I did have jurisdiction or that OSHA had jurisdiction in this case.

Q: Now, at the conclusion of your investigation, did you recommend the issuance of citations that are at issue in today's hearing?

A: Yes.

Q: And was your recommendation accepted by your area director?

A: Yes.

Q: *All of the violations that are cited in the items located in the citation, do those conditions relate to the working conditions aboard the rig or to navigational issues aboard the rig?*

A: *Working conditions.*

Q: Are there any OSHA regulations that require OSHA to assist a company in shutting down a well once a well is out of control that you're aware of?

A: Only the general duty clause; no specific standard.

Q: Maybe I'm not being clear. When you go out to do an inspection of a company like Mallard Bay in the event that there is a fire in a well, are you required to go out and fight that well fire as an OSHA inspector?

A: No.

SUMMARY OF ARGUMENT

Mallard respectfully submits that there is no factual or legal basis for the imposition of OSHA jurisdiction in this case. In short, the Department of Labor has no jurisdiction to assess any citation or penalties against Mallard which arise out of a "marine casualty" aboard the MR. BELDON. The United States Coast Guard is the exclusive federal agency charged with the responsibility of regulating the "working conditions" of "seamen" on vessels – whether they be inspected or uninspected – on navigable waters. OSHA is preempted by the United States Coast Guard since this matter involves a marine casualty over which the United States Coast Guard has exclusive, pervasive jurisdiction and has in fact exercised that jurisdiction.

The Secretary spends much time asserting that the Coast Guard has abdicated its responsibility to regulate uninspected vessels; however, this bald assertion does not wash when viewed against the facts. In this case, the Coast Guard did in fact conduct an extensive six-month post casualty investigation. The Coast Guard did in fact board and inspect the MR. BELDON following this accident and interviewed numerous witnesses in connection with its investigation. OSHA, on the other hand, performed no independent investigation and its role, plain and simple, was to mirror the findings of the Coast Guard.

The Secretary attempts to skew the real issue in this case by focusing on the MR. BELDON's status as an "uninspected vessel;" however, whether the MR. BELDON was an inspected or uninspected vessel is much

ado about nothing. This is simply a distinction without a difference. The long and short of this matter is that the Coast Guard's jurisdiction over *all vessels on navigable waters* is complete and pervasive and is not diminished one iota by the characterization of a vessel as either inspected or uninspected. The United States Coast Guard does in fact have jurisdiction to board and investigate, seize and even sink uninspected vessels. With that said, there can be little question but that the Coast Guard's jurisdiction over uninspected vessels is pervasive rather than "minimal."

Section 4(b)(1) provides that the OSH Act does not apply to the working conditions of employees regulated by other federal agencies. Congress has delegated to the United States Coast Guard broad authority to "promulgate and enforce regulations for the protection of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. § 2. Nevertheless, preemption under Section 4(b)(1) does not depend upon the extent to which the other federal agency, in this case the Coast Guard, has exercised its statutory authority.

The Secretary's argument that the Coast Guard must actually issue regulations pertaining to each and every working condition regarding seamen or issue a notice that it chooses to refrain from issuing such regulations, is an unworkable interpretation of Section 4(b)(1) and simply misses the mark. Under Section 4(b)(1) the Coast Guard may preempt OSHA's regulatory authority by issuing regulations that pertain to uninspected vessels as well as by undertaking enforcement activities of the same. The plain language of that section indicates that

this is all that the Coast Guard must do to preempt this regulatory field. There is no requirement that the Coast Guard engage in the proliferation of unnecessary and minute regulations which could conceivably affect each and every working condition of a seaman on an uninspected vessel.

Mallard also submits that the Coast Guard regulates the working conditions of seamen over their entire work place activity not simply each and every hazard or risk that a seaman could be conceivably exposed to while working on the rig. Mallard's area-based working environment definition rather than the Secretary's hazard-based definition of working conditions simply makes more sense and lends itself to uniform application throughout the maritime industry. The havoc that could be created by the adoption of the Secretary's definition of working conditions is painfully apparent.

Uninspected vessels will clearly be involved in navigation related marine casualties as defined in 46 C.F.R. § 4.03-1. Will OSHA respond and conduct investigations required by existing regulations? Will OSHA respond to oil spills involving uninspected vessels? If individuals are injured in a vessel collision, one inspected and one uninspected, is OSHA allowed to investigate or must it show deference to the United States Coast Guard? Would anyone, seamen included, benefit from the inclusion of OSHA in the operation/navigation segment of the marine industry? Mallard submits that Congress clearly could not have intended such an absurd and fragmented application for the protection of safety and life at sea.

The Department of Labor relies on the Memorandum of Understanding between it and the Coast Guard to support its jurisdiction in this case; however, this reliance is misplaced. The Coast Guard has statutory *congressional* authority over all vessels. The Coast Guard's acquiescence to OSHA's purported regulation of uninspected vessels cannot provide OSHA with regulatory authority in contravention of Congress. As the Fifth Circuit has previously noted, it is not permissible for federal agencies to shift and change their respective responsibilities between themselves but instead such agencies can only assert that jurisdiction which has been properly mandated by Congress. Thus, the Memorandum of Understanding between the Coast Guard and OSHA, irrespective of the reasons which gave birth to it, does not suffice to permit OSHA to assert its jurisdiction in this matter.

Mallard submits that the issue is not whether existing regulations are adequate or if uninspected vessels should be inspected; rather, the real issue is which federal agency is charged with responsibility for marine safety? What did Congress intend when it gave statutory authority to the Coast Guard? It is axiomatic that Congress intended for the United States Coast Guard to preserve life and safety at sea for all individuals working on vessels on navigable waters. If the United States Coast Guard chooses not to exercise that authority, then it is up to Congress – not competing federal agencies – to insure that the Coast Guard follows the mandate evaluated by Congress.

Finally, Mallard submits that OSHA's jurisdiction simply does not reach vessels. Had Congress intended for OSHA to assert jurisdiction over uninspected vessels in

state territorial waters it would have specifically enumerated the territorial waters of the states in the statute. Since Congress did not include the territorial seas as part of the jurisdiction of OSHA, it is improper for the Secretary to invoke its jurisdiction in this case.

ARGUMENT

I. The United States Coast Guard Has Been Granted The Statutory Authority And Has Exercised The Authority To Promulgate And Enforce Regulations For The Promotion of Safety and Health On The MR. BELDON And Therefore OSHA Does Not Apply To Those Working Conditions.

This case involves the applicability of OSHA land-based standards to the working conditions of seamen aboard a vessel regulated by the United States Coast Guard. Section 4(b)(1) of the Act states:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1).

The United States Coast Guard has been granted statutory authority by Congress to ensure the safety and health of seamen who work aboard vessels such as the MR. BELDON. Congress established the Coast Guard as part of the Department of Transportation in 1915, several decades before OSHA was even passed. 14 U.S.C. § 2.

Congress defined the Coast Guard's primary duties to include the following:

> The Coast Guard . . . shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department . . . 14 U.S.C. § 2.

(a) Numerous Coast Guard Regulations Concerning Safety and Health Apply to The Working Conditions of the Seamen Aboard the MR. BELDON.

Clearly, the living and working conditions of seamen aboard vessels are unique and differ substantially from those of employees in land-based work places. As aptly stated by this Court more than half a century ago, "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 38, 62 S.Ct. 886, 890, 86 L.Ed. 1246 (1942). This "difference" necessitates that an agency with special maritime expertise, i.e., the Coast Guard, rather than a "jack of all trades and master of none," i.e., OSHA, be responsible for the safety of seamen.

The Fifth Circuit recognized that pursuant to this statutory grant of authority, the Coast Guard is the federal agency which exercises authority over the working conditions of seamen. *See Clary v. ODECO*, 609 F.2d 1120 (5th Cir. 1980); *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th

Cir. 1983). Accordingly, the Fifth Circuit correctly held that Section 4(b)(1) precludes the application of OSHA standards to the "working conditions" of "seamen."

It is of no import whether the MR. BELDON is considered an inspected or uninspected vessel for purposes of OSHA jurisdiction. Simply put, the United States Coast Guard has exclusive responsibility for the safety and working conditions of seamen serving on vessels – both inspected and uninspected. Moreover, the United States Coast Guard has issued regulations and prescribed standards for safety on uninspected vessels in addition to inspected vessels. (A comprehensive list of such regulations is attached to the Amicus Brief of the Transportation Institute as Appendix 1.) Numerous sections of the United States Code govern and regulate "in minute detail the rights and duties of seamen." *Donovan v. Texaco Inc.*, 720 F.2d 825, 828 (5th Cir. 1983). In those sections Congress has delegated to the Coast Guard the authority and responsibility for ensuring the safety of seamen and regulating the health of seamen aboard vessels operating on navigable waters. Simply because the Coast Guard has chosen not to issue regulations for each and every conceivable contingency on an uninspected vessel does not mean that it has failed to exercise its authority.

It is undisputed that the Coast Guard has in fact issued regulations specifically tailored to uninspected vessels. It is further undisputed that under Section 4(b)(1) the Coast Guard may preempt OSHA's regulatory authority by exercising the statutory authority to prescribe such regulations. The plain language of the section indicates that this is all that the Coast Guard must do to preempt OSHA in this matter. The issue is not whether the Coast

Guard has issued sufficient regulations or has in fact undertaken enforcement activities consistent thereto. Rather the issues are whether Congress has given the Coast Guard congressional authority to issue such regulations – which it has – and whether the Coast Guard has undertaken to regulate this area – which it has. The Secretary's contention that the Coast Guard has either abdicated its responsibility through the Memorandum of Understanding or simply has not exercised its authority sufficiently misses the mark. As the Third Circuit has noted, the preemption inquiry "does not require us to look beyond the exercise of statutory authority by the agency; no language refers to the *quality or consistency* of the agency's exercise of statutory authority." *Pennsylvania Electric Co. v. Federal Mine Safety & Health Review Commission*, 969 F.2d 1501, 1505 (3d Cir. 1992). (emphasis in original)

Contrary to the Secretary's position, the Coast Guard regulates the working conditions aboard uninspected vessels as well as inspected vessels. The primary Coast Guard regulations applicable to seaman are contained in Chapter 1 of Title 46 of the Code of Federal Regulations. This chapter is broken down into twenty-one subchapters. Subchapter C is entitled "Uninspected Vessel" and sets forth a number of specific regulations protecting against a variety of hazards which may arise in the working environment of seamen aboard uninspected vessels. These regulations are promulgated pursuant to Chapter 41 of Title 46 of the United States Code, in which Congress specifically delegated to the Coast Guard the authority to promulgate and enforce regulations governing uninspected vessels. This chapter of the U.S. Code is

entitled "Uninspected Vessels Generally" and the statutes within the chapter make specific reference to safety equipment. *See* 46 U.S.C. § 4102.

The owner or operator of an uninspected vessel that does not comply with the statutory requirements or the Coast Guard regulations applicable to uninspected vessels may be subject to civil penalties. Moreover, the Coast Guard can actually seize the vessel to satisfy the penalties. *See* 46 U.S.C. § 4106 ("the vessel also is liable *in rem* for the penalty"). Subchapter C of the Coast Guard regulations includes specific regulations on numerous safety and health concerns applicable to uninspected vessels. In fact, contrary to its decision in this case, the Commission recognized over a decade ago that:

> Among the subjects regulated are navigation; ventilation; fire protection equipment; life preservers and other life-saving equipment; the design, construction and testing of boilers and machinery; liquified petroleum gas; back fire flame arresters for gasoline engines; safety orientation and emergency instructions; and pilot ladders.

Dillingham Tug & Barge Corp., 10 OSH Cas. BNA 1859, 1861 (No. 77-4143) 1982. This subchapter on uninspected vessels specifically states that the Coast Guard shall have a marine inspector to ensure that the regulations are adhered to and that the working conditions aboard uninspected vessels are safe. *See* 46 C.F.R. § 24. 10-15.

The Secretary's position in this case is based on an erroneous interpretation regarding the extent of the Coast Guard's authority over inspected vessels. The Secretary represents to this Court that the Coast Guard's regulation

of inspected vessels is minimal; however, the Secretary's representation is incorrect.

Clearly the Coast Guard's authority is not limited to one chapter of the United States Code dealing specifically with uninspected vessels. As stated earlier, 14 U.S.C. § 2 delegates to the Coast Guard the general authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." This general grant of authority is much broader and *includes* safety issues on navigable waters, regardless of the type of vessel. *See Foremost Insurance Company v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 2658-59 (1982) (admiralty and maritime rules must apply on navigable waters regardless of the type of vessel involved).

Indeed, many other Coast Guard regulations outside the chapter entitled "Uninspected Vessels" govern the working conditions of seamen aboard uninspected vessels. The obvious reason these regulations are not included in the specific subchapter entitled "Uninspected Vessels" is because they apply to other types of vessels as well. Much like OSHA regulations, these regulations include safety standards and training requirements.

While the statutes and regulations discussed above are intended to prevent injuries aboard uninspected vessels, the Coast Guard has also promulgated regulations for investigating accidents and injuries on vessels when they do occur so that remedial action can be taken if necessary to safeguard against future accidents and injuries. All injuries, including deaths, which may occur on a vessel must be reported to the Coast Guard as required

by 46 U.S.C. §§ 6301-6307. The Coast Guard has promulgated extensive regulations pursuant to these statutes for the reporting and investigation of virtually all marine accidents. *See* 46 C.F.R. Part 4. These regulations apply to "any casualty or accident involving *any vessel* other than public vessels if such casualty or accident occurs upon the navigable waters of the United States." 46 C.F.R. § 4.03-1(a) (emphasis added). Thus, these regulations clearly apply – and even the Secretary concedes – to a privately owned uninspected vessel such as the MR. BELDON.

The Secretary asserts in its brief that one of its goals is to avoid "duplication of effort;" however, the duplication of effort on the part of the Coast Guard and OSHA in the present case is obvious. The Secretary's position is also inconsistent with the legislative history surrounding the enactment of the OSH Act:

> The Committee recognizes the need to insure employers that they will not be subject to unnecessary or duplicative record-keeping requests and has specifically stated this intent in Section 8(d). To that end, the Committee intends that, wherever possible, reporting requirements should be satisfied by having an employer report relevant data only to one governmental agency and that other governmental agencies, if any, such then acquire their information from the original agency.

Legislative History, Public Law 91-596; Senate Committee on Labor and Public Welfare, 92nd Congress, 1st Sessions, Legislative History of the Occupational Safety and Health Act of 1970.

Moreover, these Coast Guard regulations require the reporting of a marine accident involving an uninspected vessel even when the accident results in no injuries. The regulations clearly specify that they cover *any* accident involving a vessel which *caused* damage "which might affect or impair the seaworthiness of the vessel." 46 C.F.R. § 4.03-1(b). In contrast, OSHA regulations require that employers keep a log of only "recordable" injuries (29 C.F.R. § 1904.2) and that only very serious accidents be reported. (29 C.F.R. § 1904.8). Thus, the Coast Guard regulations applicable to the reporting of accidents involving uninspected vessels are again more protective than OSHA regulations. Indeed, contrary to its decision in this case, the OSHA Review Commission fully recognized in its *Dillingham* decision that many other Coast Guard regulations, outside those in the chapter entitled "Uninspected Vessels," apply to the working conditions of seamen on uninspected vessels. After discussing the safety regulations which pertain particularly to uninspected vessels, the Commission reasoned:

> In addition, various provisions of other subchapters, such as subchapter P – entitled "Manning of Vessels" – apply to uninspected vessels as well as other types of vessels. Moreover, the Coast Guard's authority to investigate maritime accidents and to enforce its regulations applies to uninspected vessels, as illustrated by the Coast Guard investigation that followed the accident involved in this case. *See* 33 C.F.R. § 1.07-10. Thus, the Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters. *Dillingham Tug & Barge Corp.* 10 BNA OSHC at 1861.

Indeed, the OSHA Review Commission recognized almost twenty years ago that the distinction between inspected and uninspected vessels makes no difference whatsoever under Section 4(b)(1) of the Act. In *Dillingham* the Commission noted that "the Coast Guard has issued regulations directed at the protection of seamen for uninspected vessels as well as for vessels it inspects and certificates. Thus, there is no distinction between uninspected vessels and inspected and certificated vessels for the purpose of this case." 10 *Dillingham*, BNA OSHC at 1861 n.6. Of course, there is no evidence whatsoever that the Coast Guard's authority or regulations have been diminished in any way since *Dillingham* was decided.

The Fifth Circuit in *Donovan* went a step further to specifically reject the Secretary's contention that preemption under Section 4(b)(1) only applies if the Coast Guard has the specific regulation comparable to the OSHA regulation at issue. *Donovan*, 720 F.2d at 826-827. The Court reasoned that the Secretary's interpretation of Section 4(b)(1) is clearly contrary to Congressional intent:

> Section 4(b)(1) evidences a general Congressional intent to forbid overlapping regulation of working conditions in any given industry by multiple federal agencies. Such redundant control programs offer little except confusion, governmental proliferation, and stultification of enterprise. Congress having declared against them in this instance it is not for us to disagree.

Donovan, at 827. The Court further explained:

> Section after section of the United States Code governs and regulates in minute detail the rights and duties of seamen, down to the form of shipping articles to be signed by them and the contents of their daily diet.

720 F.2d at 828.

The Secretary's erroneous interpretation is apparently based on the term "uninspected vessels" which is somewhat of a misnomer. Presumably, the phrase "uninspected vessel" was used simply because those vessels are not required to be inspected on a definite schedule as are those which are classified "inspected vessels." 46 U.S.C. § 2101(43) defines an uninspected vessel as "a vessel not subject to inspection under § 3301 of this title that is not a recreational vessel." This does not mean however that "uninspected vessels" are not subject to Coast Guard inspections or regulations; instead, it simply means that they are not subject to Coast Guard inspections on a regularly-scheduled basis.

Indeed, the Coast Guard's treatment of uninspected vessels is quite similar to the Secretary's inspections of ordinary workplaces. The Secretary generally inspects workplaces following accidents, based on an employee complaint or on a random periodic basis. Similarly, uninspected vessels are subject to Coast Guard inspections following a marine accident, pursuant to a complaint that a particular condition on a vessel is unsafe or unseaworthy and on random periodic bases. Thus, the Coast Guard's regulation of the working conditions of seamen

on uninspected vessels is quite similar to OSHA's regulation of ordinary workplaces.

Undoubtedly the Secretary believes that she has exercised her authority to regulate the working conditions of ordinary work places even though she does not conduct regularly scheduled inspections of each and every work place. She cannot now credibly contend that the Coast Guard has not exercised its authority when it regulates uninspected vessels in much the same manner. Furthermore, the Coast Guard, not OSHA, has the particular expertise to promulgate and enforce safety regulations for seamen. Mallard respectively submits that OSHA's entry into marine casualties would only confuse and unnecessarily complicate matters for marine employers. It simply belies common sense, and Congress clearly could not have intended for two separate federal agencies to simultaneously conduct investigations into the "working conditions" of seamen. The waste of time and resources for both private industry and government is patently obvious.

Mallard respectfully submits that this Court should adopt the rationale espoused in the Fifth Circuit. *Clary v. ODECO, supra*, is the leading Fifth Circuit case to discuss the Coast Guard's preemption of OSHA jurisdiction with respect to the "working conditions" of "seamen" working on vessels in navigable waters. In *Clary*, the plaintiff-roustabout suffered a knee injury on a submersible drilling vessel when he tripped over a retaining wall on a rig. Plaintiff specifically alleged that it was a violation of OSHA regulations not to have the retaining wall upon which he tripped color coded yellow as to make it more visible. The trial court, however, refused to allow plaintiff

to introduce into evidence OSHA regulations pertaining to color coding on the grounds that such regulations did not apply to vessels in navigation. *Clary v. ODECO*, 429 F.Supp. 905 (W.D.La. 1977).

In affirming the decision of the trial court, the Fifth Circuit articulated three persuasive reasons for refusing to allow OSHA regulations proffered by plaintiff into evidence. *Clary v. ODECO*, 609 F.2d 1120 (5th Cir. 1980). First, it cites Section 4(b)(1) of the OSH Act and notes:

> The Coast Guard is a federal agency exercising statutory authority over the working conditions of seamen. Coast Guard regulations cover, among other things, standards governing the safety and health of persons working on vessels.

Id. at 1121.

Second, the *Clary* court emphasized that the OSHA commission has "disclaimed an intention to promulgate standards applicable to seamen," and has consistently conceded jurisdiction over the safety and health of seamen to the Coast Guard. Finally, the Court noted that the regulations proffered by plaintiff simply did not apply to a "special purpose drilling vessel in navigation." *See id.* at 1122.

Like the plaintiff in *Clary*, crew members aboard the MR. BELDON are seamen, not longshoremen. Like the plaintiff in *Clary*, the crew members aboard the MR. BELDON were assigned to a "special purpose drilling vessel." Like the plaintiff in *Clary*, the United States Coast Guard, not the Department of Labor, is the federal agency charged with responsibility for the safety and working conditions of seamen aboard the MR. BELDON.

The Secretary argues that her interpretation of the Act together with Commission precedent should be given preference in determining its jurisdiction. However, to say that the Commission itself has not been consistent on this issue is a mild understatement. In *Puget Sound Tug & Barge*, 9 OSH Cas. BNA 1764, 1981 WL 18907 (OSHRC April 30, 1981), the Commission held that Coast Guard regulation preempted the OSH Act as to vessels in navigable waters only to the extent that the Coast Guard regulated specific working conditions. However, in *Dillingham Tug & Barge Corp.*, 10 OSH Cas. BNA 1859, 1982 WL 22639 (OSHRC July 29, 1982), the Commission overruled *Puget Sound* and held that Coast Guard regulation of uninspected vessels was so pervasive that it entirely preempted OSHA regulation, i.e., a virtual industry exemption. This interpretation of Section 4(b)(1) avoided the "nook and cranny" approach coined by the Fifth Circuit which would allow OSHA regulation over every "working condition" not specifically regulated by the Coast Guard. Then in another turnabout in *Alaska Trawl Fisheries*, 15 OSH Cas. BNA 1699, 1992 WL 155480 (OSHRC June 18, 1992), the Commission dismissed the *Dillingham Industry* exemptions as *dicta*. Mallard submits that the jurisdiction of the Coast Guard, vis-a-vis OSHA should not depend on which way the wind blows when the Commission meets on a certain case but rather should be mandated by Congressional directives.

At trial of the case *sub judice*, OSHA's representative, Mike Spohrer, was questioned regarding the purpose of OSHA's involvement in this matter. Spohrer testified that

his investigation, like that of the Coast Guard, centered on the "working conditions" of the Mallard crew members. This is exactly what Congress has prescribed the United States Coast Guard to do in all instances! Spohrer's testimony is unequivocal:

> Q: Why was it necessary for you to review this [Memorandum of Understanding] during the course of your inspection?
>
> A: I wanted to be certain that I did have jurisdiction or that OSHA had jurisdiction in this case.
>
> Q: Now at the conclusion of your investigation, did you recommend the issuance of the citations that are at issue in today's hearing?
>
> A: Yes.
>
> Q: And was your recommendations accepted by your area director?
>
> A: Yes.
>
> Q: *All of the violations that are cited in the items located in the citation, do those conditions relate to the working conditions aboard the rig or to the navigational issues aboard the rig?*
>
> A: *Working conditions.* (emphasis added)

(TR 70-71).

Suffice it to say, the above testimony completely contradicts the Secretary that her "interpretation is also fully consistent with Section 4(b)(1)'s goal of preventing OSHA and other federal agencies from regulating the same health and safety conditions." (Page 13 of Petitioner's Brief.)

Mallard respectfully submits that Fifth Circuit rationale is compelling. The United States Coast Guard, not OSHA, is charged with the responsibility for regulating and prescribing standards for the "working conditions" of seamen serving aboard vessels on navigable waters. The Coast Guard, and not OSHA, has this special expertise in maritime casualties. The Coast Guard's jurisdiction preempts not only OSHA but every other federal agency which would otherwise attempt to assert jurisdiction over a marine casualty.

The Fifth Circuit in *Donovan*, citing *Secretary of Labor v. Dillingham Tug & Barge Corp.*, 10 OSH Cas. BNA 1859, 1982 WL 27639 (OSHRC July 29, 1982), noted that the Occupational Safety & Health Review Commission has itself concluded that OSHA has no applicability to the working conditions of seamen. Both the Commission and the Fifth Circuit recognized that 29 U.S.C. § 653(b)(1) "creates – in view of the Coast Guard's comprehensive regulation and supervision of seamen's working conditions – an industry-wide exemption for seamen serving on vessels operating on navigable waters." *Donovan*, 720 F.2d at 826.

The *Donovan* Court further opined that the regulatory authority of OSHA is completely abrogated for a particular industry if another federal agency exercises "general and pervasive" regulation of that industry. *Id.* at 826. The court concluded that the Coast Guard's regulation of vessels and seamen thus displaces OSHA coverage as to the safety and health of persons working on vessels. *Id.* at 826.

Little need be said regarding the Secretary's claim that the Memorandum of Understanding (*See* Appendix

F) shifted responsibilities for the working conditions of seamen from the United States Coast Guard to OSHA. In short, the Memorandum of Understanding is not a congressional pronouncement; rather, it is an informal memorandum between two federal agencies. Congress is the only entity which can shift responsibility from the United States Coast Guard to another federal agency. Until such time that Congress enacts legislation which does shift responsibility for the working conditions of seamen aboard uninspected vessels from the Coast Guard to OSHA, neither the Commander of the United States Coast Guard nor the Director for OSHA is at liberty to legislate responsibilities among themselves. *See Donovan v. Texaco, Inc.*, 720 F.2d 825, 827-28, n.3 (5th Cir. 1983), in which the Fifth Circuit made it quite clear to the Secretary and the Coast Guard that they are not authorized to overrule Congress' delegation of authority by shifting responsibilities for assuring the safe working conditions of seamen, stating: "It is not for modalities of the federal power to trade functions between themselves in perpetuity by agreement; the will of Congress must control." *Id.*

The United States Court of Appeals for the Fourth Circuit has likewise adopted the rationale of the Fifth Circuit. In *Taylor v. Moore-McCormick Lines, Inc.*, 621 F.2d 88, 92-93 (4th Cir. 1980), the Court stated:

> In summary, we think that Section 2, 14 U.S.C. makes it quite clear what is the proper delineation of responsibility between the Coast Guard and the Secretary of Labor in this area: The Coast Guard has responsibility for the safety of "seamen" under regulations issued by it, whereas the Department of Labor, under OSHA, has statutory responsibility for the safety of

> longshoremen at work under regulations issued by it. The respective responsibilities, thus established, are exclusive. *Id.* at 92-93.

While other circuits have reached a contrary result, *see In Re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir. 1986), *cert. den.*, 107 S.Ct. 271 (1986); *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984), *cert. den.*, 105 S.Ct. 1355 (1985), these decisions are premised on the erroneous assumption that the Coast Guard has minimal responsibility for regulating safety on board uninspected vessels, and they completely ignore the Coast Guard's general grant of authority under 14 U.S.C. § 2 and the extensive regulations outside the sub-chapter entitled, "Uninspected Vessels."

(b) The Phrase "Working Conditions of Employees" Means the General Work Site In Which Employees Perform Their Daily Task.

The "nook and cranny" interpretation of Section 4(b)(1) ignores the meaning of the phrase "working conditions of employees." According to the "nook and cranny" theory advanced by the Secretary, each and every OSHA regulation and standard would create a different working condition within the meaning of the jurisdictional statute. This interpretation is simply nonsensical.

The phrase "working conditions of employees" has been interpreted by the courts to mean the general area or work site in which employees perform their daily tasks. *See United Entergy Services, Inc. v. Federal Mine Safety & Health Admin.*, 35 F.3d 971, 977 (4th Cir. 1994)

(holding that power plant located next to and operating in connection with coal mine constituted "working conditions" within the meaning of Section 4(b)(1)); *Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F.2d 913, 916-17 (3d Cir. 1980) (defining "working conditions" as being "the discrete work site at a trench"); *Marshall v. Nichols*, 486 F.Supp. 615, 619 (E.D. Tex. 1980), reversed in part on other grounds; *Donovan v. Nichols*, 646 F.2d 190 (5th Cir. 1981) (holding that the entire offshore platform constituted the "working conditions for OSHA jurisdictional purposes").

After recognizing that the term "working conditions" under Section 4(b)(1) refers to the general environmental area or work place in which employees perform their daily tasks, the courts uniformly hold that further analysis into the other agencies' enforcement activities or regulations is inappropriate. For example, the United States Court of Appeals for the Third Circuit has held that the term "working conditions" within the meaning of Section 4(b)(1) included an entire plant involved in the handling and processing of coal. The court went on to find that OSHA regulations were preempted as to the entire plant, reasoning as follows:

> The operative language [of Section 4(b)(1)] shows that the exercise of statutory authority by an agency triggers the preemption of OSHA. The statute does not require us to look beyond the exercise of statutory authority by the agency; no language refers to the quality or consistency of the agency's exercise of statutory authority.

Pennsylvania Electric Co. v. Federal Mine Safety & Health Review Comm., 969 F.2d 1501, 1505 (3d Cir. 1992).

The Fourth Circuit has interpreted OSHA jurisdiction under Section 4(b)(1) the same, reasoning:

> Under Section 4(b)(1), MSHA may preempt OSHA's regulatory authority by "exercising statutory authority to prescribe . . . regulations affecting" the area at issue. The plain language of that section indicates that this is all that MSHA must do to preempt this regulatory field.

United Entergy Services, 35 F.3d at 971.

Contrary to this interpretation of "working conditions" under Section 4(b)(1), the Secretary in the present case errs by arguing that OSHA regulations can only be preempted as to the working conditions aboard an uninspected vessel if the Coast Guard has a substantially similar or "redundant" regulation addressing the exact same hazard and with the exact same intent. Clearly, this interpretation reads out of the jurisdictional statute entirely the term "working conditions." Applying the proper definition to the term "working conditions" in this case requires that the Court deem the general environmental area or work place at issue here as the entire vessel, not each piece of machinery, room, practice and procedure implemented on the vessel.

It is not far-fetched to state that allowing OSHA to regulate the working conditions of seamen on uninspected vessels on navigable waters on the basis that a particular working condition, i.e., in this case the risk of explosion due to the presence of natural gas, has not been expressly addressed by Coast Guard would lead to

wholly inconsistent assessments by OSHA inspectors who utilize different and varying "interpretive techniques" when making a jurisdictional decision. Vessel owners also would be burdened by attempting to ascertain the delineation of responsibility between the Coast Guard and OSHA as vessels travel in and out of state territorial waters. The lack of maritime uniformity on this issue would only hamper, not enhance, maritime commerce.

Similar to this more realistic interpretation of "working conditions" the United States Court of Appeals for the District of Columbia has reasoned that preemption under Section 4(b)(1) of the Act may apply to "a class of workers." *Organized Migrants in Community Action, Inc. v. Brennan*, 520 F.2d 1161, 1167 (D.C. Cir. 1975). Even if the "working conditions" in this case did not include the entire vessel, the class of workers at issue are seamen. Courts have noted that the relationship between a master and seaman is unique and "entirely different from that of employer to employee on land." *Donovan*, 720 F.2d at 828, quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 62 S.Ct. 886, 890 (1941). In analyzing the same jurisdictional issue under Section 4(b)(1) of the Act, the Fifth Circuit reasoned that because of this unique relationship OSHA regulations must give way when sought to be applied to the working conditions of seamen aboard vessels in navigation. 720 F.2d at 828-29.[1] Significantly, there is no evidence that any persons other than seamen was exposed to

[1] See also the Commission's reasoning in *Dillingham*: "This case involves an alleged hazard to a seaman arising out of activities aboard a vessel operating on navigable waters. The Coast Guard, *an agency with special expertise in maritime hazards* has exercised its statutory authority to prescribe standards and regulations governing the working conditions of seamen. 10 OSH Cas. BNA at 1862 (emphasis added).

the alleged hazards for which the citations in this case were issued.

In short, the clear wording of Section 4(b)(1) states that if another federal agency has exercised statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health in some working environments, then OSHA standards and regulations do not apply. It is up to that federal agency which has been empowered by Congress to regulate those working conditions to decide what rules and regulations are needed to insure the health and safety of the employees. Thus, the Secretary cannot usurp authority to regulate these vessels; it must be left to the federal agency which is given the responsibility of dealing with that working environment.

The Secretary's position that seamen can only be adequately protected through her "nook and cranny" interpretation of Section 4(b)(1) is also belied by her own enforcement activities. Simply because there may not be a specific regulation governing every piece of equipment aboard a vessel does not mean that the working conditions of seamen are not adequately protected and regulated.

The duty to provide a seaworthy vessel for seamen is much like the general duty clause imposed by OSHA on

land-based employers under 29 U.S.C. § 654(a)(1). The Secretary has never hesitated to investigate and issue citations to employers under the general duty clause even though a specific OSHA regulation has not been violated. *See, e.g., Secretary of Labor v. Morrison-Knudsen/Younkers Contracting Co.*, 16 OSCH (BNA) 1105, 1120-21 (No. 88-572, 1993); *Secretary of Labor v. Trans-Texas Well Service, Inc., d/b/a Trans-Oklahoma*, 15 OSCH (BNA) 2219, 2220 (No. 91-0391, 1992).

Indeed, the Secretary's position in this regard is hypocritical. In *Reich v. Montana Sulphur & Chemical Co.*, 32 F.3d 440 (9th Cir. 1994), *cert. den.*, 115 S.Ct. 1355 (1995), the Secretary came before the Ninth Circuit to enforce its investigative and subpoena power under the general duties clause of OSHA, even though there was no specific OSHA regulation concerning the alleged workplace hazards at issue. The Secretary argued that its authority under the Act did not depend upon the existence of a regulation governing specific workplace hazards. The Court agreed finding that the Secretary's authority under the Act is not "a series of unconnected stars in space, in between no standards govern and no investigation is proper. To the contrary, the Act consists of a general duty clause augmented in particular areas by specific regulations." 32 F.3d at 445.

The Secretary cannot credibly argue that her authority is broader than the specific regulations she promulgates while maintaining that other federal agencies such as the Coast Guard are limited in their authority and can only act if they have a specific regulation governing specific hazards. As previously mentioned, the Coast Guard has been empowered by Congress to "promulgate

and enforce regulations for the promotion of safety of life and property on and under the high seas and water subject to the jurisdiction of the United States." 14 U.S.C. § 2. The Coast Guard has exercised that authority. If the Coast Guard has not been diligent in fulfilling its responsibilities that is an issue to be addressed by Congress. It is not within the Secretary's province to make that determination nor is it even an issue in connection with the clear language of Section 4(b)(1) of the Act.

II. An Uninspected Vessel Which Operates in U.S. Territorial Waters Is Not A "Work Place" Within The Meaning of Section 4(a) of the Act, 29 U.S.C. § 653(a).

A plain reading of the scope of the OSH Act does not extend its reach to include vessels. Section 4(a) imposes geographic restrictions on OSHA's applicability. This section specifically limits the applicability of OSHA standards and regulations to work places within one of the 50 states and certain enumerated territories of the United States. 29 U.S.C. § 653(a). As such, the Fifth Circuit has previously held that a vessel is not such a "work place." *Donovan v. Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983).

(a) The Navigable Waters of the United States Are Not Listed As One of the U.S. Territories Covered By OSHA In Section 4(a) And They Are Not Part of the State.

The MR. BELDON was within the territorial waters of the United States at the time of the casualty in question; however, the territorial waters of the United States is not one of the enumerated U.S. territories listed in Section 4(a) of the Act.

Beginning around the 1930's the federal government and the coastal states engaged in a series of disputes over their respective rights to oil, gas and other natural resources extracted from offshore submerged lands. The history of these disputes is described in detail in this Court's seminal decision in *United States v. States of Louisiana, Texas, Mississippi, Alabama, and Florida*, 363 U.S. 1, 80 S.Ct. 961 (1960).

This ongoing dispute over the mineral rights to offshore submerged lands eventually led to the passage of the Submerged Lands Act of 1953. This Court described the four purposes of the Submerged Lands Act as follows:

> (1) To relinquish to the state the entire interest of the United States and the *lands beneath navigable waters within state boundaries;*
>
> (2) To define that area in terms of state boundaries as they existed at the time a particular state became a member of the union or approved by Congress, not to exceed seaward from the coast of any state more than three marine leagues in the Gulf of Mexico or more than three geographic miles in the Atlantic and Pacific Oceans;

> (3) To confirm to each state a seaward boundary of three geographic miles; and
>
> (4) *To reserve to the United States all constitutional powers of regulation and control over the territorial waters for purposes of commerce, navigation, national defense, and international affairs.*

See 363 U.S. at 8-10, 80 S.Ct. at 967-69.

A careful reading of this Court's decision and the Submerged Lands Act demonstrates that the dispute over this "three mile territory" involved the seabed or submerged lands," not the water itself. In its decision, this court stated:

> **The controversy centered primarily on the ownership of the oil rich *submerged lands* off the Coast of California.**

363 U.S. at 17, 80 S.Ct. at 972 (emphasis added).

In fact, the very title of the Act suggests that the federal grant to the states was of the "submerged lands" not the water.

The ultimate result was that the states were granted the sea bottoms extending three miles out from their coast. 43 U.S.C. § 1312. However, the Submerged Lands Act specifically preserved the federal government's primary or "paramount" authority to the waters above those sea beds, i.e., the territorial waters. Section 6 of the Submerged Lands Act makes it clear that the states acquire ownership rights to the submerged lands and the natural resources that were extracted from the submerged lands but that the federal government retained paramount

authority with regard to "navigation, regulation and control of the navigable waters for the constitutional purposes of commerce, navigation, national defense and international affairs." 43 U.S.C. § 1314(a).

That the waters remain primarily federal territory is further supported by the Coast Guard regulations defining the territorial seas. 33 C.F.R. § 2.05-25(a) states:

> With respect to the United States, *territorial seas* means the waters within the belt, three nautical miles wide that is adjacent to its coast and seaward of the territorial sea base line.

(emphasis in original)

33 C.F.R. § 2.05-25(a) states that these territorial seas are considered the "navigable waters of the United States." And the regulations go on to state quite clearly that the navigable waters of the United States are subject to the jurisdiction of the federal government. 33 C.F.R. § 2.05-30.

As mentioned, the Submerged Lands Act specifically states that the federal government retains paramount authority over the "navigable waters for the constitutional purposes of commerce." 43 U.S.C. § 1314(a). Significantly, the OSH Act was passed pursuant to Congress' authority under the Commerce Clause of the Constitution. *See* 29 U.S.C. § 651(a). Since the territorial waters of the United States are within the primary control of the federal government for purposes of commerce and since the OSH Act was passed pursuant to the Commerce Clause, the territorial waters remain a federal territory within the meaning of the OSH Act and not "a work place in a state." Furthermore, since the territorial waters of the

United States is not one of the U.S. territories listed in Section 4(a), the OSH Act does not apply to vessels operating on those waters.

(b) Section 4(a) Does Not Cover Vessels That "Steam In And Out Of OSHA Coverage."

Assuming *arguendo* that the U.S. territorial waters could be construed to be a "work place in a state" within the meaning of Section 4(a), such an interpretation would wreck havoc in the maritime industry and would clearly create the anomaly of work places "steaming in and out of OSHA coverage." *Donovan*, 720 F.2d at 829. Indeed, the Fifth Circuit's reasoning is quite strong and describes such an interpretation of Section 4(a) as producing a "disastrous and unworkable rule." The Fifth Circuit stated:

> This would be, we think, a disastrous and unworkable rule: one that would require . . . vessels to paint all stumbling hazards yellow as they enter port, one that would forbid retaliation for complaints made to the Coast Guard in port but not for those made to it on the high seas and so forth.
>
> From *Southern S.S. [vs. NLRB, 316 U.S. 31 (1941)]*, from *Oil Chemical and Atomic Workers International Union, AFL-CIO [vs. Mobil Oil Corp., 426 U.S. 407 (1976)]*, and from common sense, we derive the principle that a single uniform set of rules should govern the maritime work place. Because of OSHA's geographic limitations [contained in Section 4(a)], this cannot be those of OSHA. 720 F.2d at 829.

Clearly, the working environment of seamen is unique as the work place itself travels from place to

place. This unique working environment must be governed by a single uniform set of rules rather than one that changes each time a vessel enters or departs the territorial waters of the United States. Section 4(a) simply does not and should not provide coverage for work places that travel in and out of OSHA's jurisdiction.

There are other compelling reasons to deny OSHA jurisdiction in this case. First, the regulations contained in 29 C.F.R. (Department of Labor standards) were not written with vessels and crewmen in mind, and in fact, operators in the marine industry were never given the opportunity to participate in the rule-making process. There was no cost benefit analysis in which vessel owners/operators were considered. All analyses of OSHA general standards were from the prospective of the shore-based industry.

When the regulations were originally published in the Federal Register as a Notice of Proposed Rule-Making, the marine industry was defined as "shipbuilding; longshoring; ship repair; or those industries now covered by 29 C.F.R. 1910." There was no indication that vessels (inspected or otherwise) were subject to those standards, nor were seamen included as individuals who would be covered by OSHA. There have been no subsequent congressional regulatory actions that have extended OSHA regulations to cover that portion of the marine industry which involves the "working conditions" of "seamen" on vessels on navigable waters.

The regulatory process is designed to afford a regulated industry an opportunity to analyze proposed standards and make constructive criticism where necessary.

This essential part of the rule-making process helps develop reasonable safety standards that can be implemented and observed without imposing undue hardship on an industry. If the Secretary's position in this case was adopted, an entire industry, i.e., the marine industry, would be denied the opportunity to evaluate proposed OSHA regulations.

CONCLUSION

In conclusion, the U.S. Fifth Circuit Court of Appeals, arguably the preeminent circuit court in the country, has reached the correct interpretation in this case. The Fifth Circuit's decision is in complete harmony with both congressional intent and federal regulatory framework. Accordingly, the Judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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